IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE HARUN-UL-RASHID

FRIDAY, THE 3RD AUGUST 2007 / 12TH SRAVANA 1929

T.R.C.No.156 of 2002

A.I.T.A.43/1999 OF THE KERALA AGRICULTURAL INCOME TAX APPELLATE TRIBUNAL, ADDITIONAL BENCH, ERNAKULAM.

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PETITIONER: APPELLANT IN T.A.:-

THE MIDLAND RUBBER AND PRODUCE CO.LTD., ALAPPUZHA,
REP.BY ITS VICE PRESIDENT (FINANCE),
MR.R.VENUGOPALAN.

BY ADV. SRI.A.K.JAYASANKAR NAMBIAR

RESPONDENT: RESPONDENT IN T.A.:-

STATE OF KERALA.

BY SENIOR GOVERNMENT PLEADER SRI.MUHAMMED RAFIQ.

THIS TAX REVISION CASE HAVING BEEN FINALLY HEARD ON 03/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

H.L.DATTU, C.J. & HARUN-UL-RASHID, J.

T.R.C. No.156 of 2002

Dated this the 3rd day of August, 2007.

O R D E R

H.L.Dattu, C.J.

This revision petition is under the provisions of the Kerala Agricultural Income Tax Act, 1991.

(2). The petitioner is a company incorporated under the provisions of the Companies Act, 1956 and is an assessee under the provisions of the Kerala Agricultural Income Tax Act. The main business of the assessee is growing, cultivating and producing plantation crops of tea, rubber and cardamom. For the assessment year 1995-1996, the assessee had claimed deduction under Section 9 (4) of the Agricultural Income Tax Act, 1991 which was inserted by the Kerala Finance Act, 1994.

(3). The assessing authority before accepting the claim of the assessee had issued a pre-assessment notice and in that notice it was stated as under:

> "The claim of deduction u/s 9 (4) is proposed to be disallowed for want of evidence of equity participation in AVT Mc-Carmick Ingredients (P) Ltd. Nevertheless, the claim will be considered if the assessee produces copies of the share certificates of the new company, its memorandum and articles of association etc..."

(4). After the receipt of the proposal so made, the assessee had filed a detailed reply. Along with the reply, it had produced the proof for having invested certain amounts in the share certificates.

(5). While computing the tax liability of the assessee, the assessing authority has rejected the claim for deduction under Sec.9 (4) of the Act only on the following grounds:

> "The assessee has submitted that they have made an investment of Rs.1,35,00,000.00 as equity in a new company viz. AVT Mc-Cormick Ingredients Private Limited having its factory at Vazhakkulam, Kerala and they have produced copies of share certificates of their investments in the company. Memorandum and Articles of Association were not produced although specifically called for.
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> Verification of the copies of share certificates revealed that the company has invested funds for Rs.35,00,000.00 equity shares of a company namely AVT Mc Cormic Ingredients (P) Limited. Apart from the evidence that they have invested Rs.1,35,00,000/- in a company called AVT Mc Cormick Ingredients (P) Ltd. and they have established a factory at Vazhakkulam, Kerala the assessee has not produced any evidence to prove that they have invested in a new industrial undertaking in the state. Perusal of copies of share certificate evidently speaks that the company is constituted outside Kerala and this does not qualify for deduction under Section 9 (4) of the AIT Act."

(6). Aggrieved by the disallowance of the above claim, the assessee was before the first appellate authority, namely, the Deputy Commissioner (Appeals). The first appellate authority while considering the appeal filed by the assessee, has collected sufficient evidence by visiting the premises of AVT Mc Cormick Ingredients (P) Ltd. In a situation like this, the evidence so collected requires to be made known to the assessee before using it against the assessee. Further, it is not permissible in law to make use of the evidence so collected behind the back of the assessee while fixing or denying the claim of the assessee for certain reliefs under the Act. Ignoring this first principle, the appellate authority has proceeded to confirm the order passed by the assessing authority by disallowing the claim of the assessee for exemption under Sec.9 (4) of the Agricultural Income Tax Act.

The order so passed by the first appellate authority was the subject matter of second appeal before the Tribunal in A.I.T.A.No.43 of 1999. The Tribunal, by its order dated 15th January, 2002 has rejected the appeal. The assessee is before us in this revision petition filed under Sec.78 of the Agricultural Income Tax Act, 1991.

(7). The assessee has framed the following questions of law for our consideration and decision. They are as under:

> "i) Whether in the facts and circumstances of the case was the Tribunal right in confirming the findings of the first appellate authority, to the extent of the confirmation of disallowance under Sec 9 (4) of the AIT Act regarding facts which was not forming part of the assessment order and therefore not forming part of the first appeal?
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> ii) Whether in the facts and circumstances of the case was the Tribunal right in coming to the conclusion that the new industrial undertaking in which the company had invested is a down stream industry?
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> Iii). Whether in the facts and circumstances of the case ought not the tribunal have addressed the issue as to whether the new industrial undertaking is a manufacturing unit or not before coming to the conclusion that the new industrial undertaking is a down stream industry?
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> iv). In the facts and circumstance of the case ought not the tribunal have allowed the claim of deduction under Section 9 (4) of the Agricultural Income Tax Act?
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> v). In the facts and circumstances of the case ought not the tribunal have held that, the amendment made in 1-4-1998 giving retrospective effect would also entitle the petitioner for claim of deduction under Section 9 (4) of Agricultural Income Tax Act as the conditions stipulated are satisfied.
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> vi). In the facts and circumstances of the case ought not the Tribunal have disallowed the inclusion of income from Dadap trees cut and sold so that they do not regenerate as being a capital receipt more so in view of the decision of the Supreme Court reported in (1966) 60 ITR 275 and 120 ITR 70?
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> vii). In the facts and circumstances of the case was the Tribunal right in confirming the portion of the management expenses relating to trading business of the company when the

petitioner had demonstrated that the expenses towards trading business was accounted for under that head only?"

(8). At the time of hearing of the revision petition, Mr.Anil D. Nair, learned counsel appearing for the assessee, would not press for answer on issue Nos.5, 6 and 7.

(9). Apart from others, the learned counsel, Mr.Anil D. Nair, would submit that the first appellate authority, based on the materials collected after an enquiry, and without furnishing those materials/evidence to the assessee should not have rejected the appeal filed by the assessee. According to the learned counsel, all these aspects of the matter were urged and argued before the Tribunal and the same has not been considered by the Tribunal and, therefore, the order passed by the first appellate authority and the Tribunal is arbitrary, illegal and is in violation of the principles of natural justice. Therefore, the counsel requests us to set aside the orders passed by the first appellate authority and the Tribunal and remand the matter to the first appellate authority to pass a fresh order, after providing the material information/evidence collected against the assessee.

(10). Sri. Muhammed Rafiq, the learned counsel for the revenue, sought to justify the impugned order.

(11). The assessing authority in the instant case, had rejected the claim of the assessee only on the ground that the assessee has not made investment in an industry in the State of Kerala, though the assessee has produced sufficient materials before him to demonstrate that the company fulfills all the materials required for the purpose of exemption under Section 9 (4) of the Agricultural Income Tax Act as amended by the Finance Act, 1994.

(12). The assessee had carried the matter in appeal before the first appellate authority. It is contended that, though the assessee has produced sufficient materials to justify its claim for deduction under Section 9 (4) of the Agricultural Income Tax Act, the assessing authority has rejected the claim. While considering the appeal, the first appellate authority has also visited the business premises of AVT Mc-Cormick Ingredients Private Limited company which is supposed to be a company where the assessee has invested certain amounts to claim deduction under Sec.9 (4) of the Act. Before making use of the evidence that was collected against the assessee, it was expected by the first appellate authority to have made known of those materials/evidence to the assessee. In the instant case, such a thing is not done by the first appellate authority. If the assessing authority or the appellate authority wants to make use of the materials which were not within the knowledge of the assessee, the same would be in violation of the principles of natural justice. In the instant case, the order passed by the first appellate authority would clearly demonstrate that certain materials had been collected by the first appellate authority and those materials were not furnished to the assessee, but were used against the assessee for rejecting the claim of the assessee for exemption under Sec. 9 (4) of the Act. This omission and commission on the part of the first appellate authority is in violation of the principles of natural justice. Therefore, the order passed by the first appellate authority requires to be set aside.

(13). When, those aspects of the matter were urged and argued by the assessee in the appeal filed by it before the Tribunal, the Tribunal should have appreciated the stand of the assessee on this issue. Without doing so, the Tribunal has mechanically considered the order passed

by the first appellate authority. This, in our opinion, is also impermissible. Accordingly, the following:

ORDER

(i) The revision petition is allowed.

(ii) The order passed by the first appellate authority in AITA.No.29 of 1998 dated 20th February, 1999 and the order passed by the Income Tax Appellate Tribunal in AITA No.43 of 1999 dated 22nd May, 2001 are set aside.

(iii) The matter is remitted back to the first appellate authority to re-do the matter afresh, in accordance with law, keeping in view the observations made by this court.

(iv) In view of the order passed in the revision petition, I.A.No.1016 of 2005 is dismissed.

Ordered accordingly.

(H.L.DATTU)
CHIEF JUSTICE

(HARUN-UL-RASHID)
JUDGE

MS/DK